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IN THE

# Supreme Court of the United States

**October Term, 1965**

**No. 1242**

LEWIS S. ROSENSTIEL,

*Petitioner,*

v.

SUSAN L. ROSENSTIEL,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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### Preliminary Statement

Respondent respectfully calls this Honorable Court's attention to the fact that as recently as March 21, 1966, in *Wood* v. *Wood* (which was a companion case simultaneously decided by the Court of Appeals of the State of New York, in a single "Opinion" bearing the titles of both the instant case and the *Wood* case)—this Court denied the Petitioner-husband's application for a Writ of Certiorari (86 S. Ct. 1197) in which the Petitioner Wood asserted—as does Petitioner herein—the precise alleged violation of due process by the Court of Appeals of the State of New York, when it sustained the validity of a bilateral divorce decree rendered in Mexico in full conformity with that nation's laws, upon the physical presence of one of the parties in that court and the appearance of the other party by an attorney, and rejected the collateral attack by the Peti-

tioner—subsequent spouse—who sought an annulment of his present marriage, entered into with knowledge of his spouse's prior Mexican divorce.

Accordingly, Respondent will not burden this Court by extensive argument in this brief in *opposition* to the Petition herein—this Honorable Court having only very recently given due consideration and rejected as undeserving of review, the same contentions previously submitted to this Court in the Petition in the *Wood* case (86 S. Ct. 1197).

## Opinions Below

The *Opinion* of the New York Court of Appeals is reported at 16 N. Y. 2d, 64 (1965). The *Opinion* of the Appellate Division of the Supreme Court of the State of New York—which was affirmed by the New York Court of Appeals, is reported in 21 App. Div. 2d 635 (First Department 1964). The *Opinion* of the New York Supreme Court for the County of New York, is reported at 43 Misc. 2d 462 (1964).

## Questions Presented

1. Does the judgment of the Court of Appeals of the State of New York, which recognized as valid a Mexican bilateral decree of divorce dissolving Respondent's prior marriage to one Felix Kaufmann, rendered in full conformity with Mexico's laws upon the physical presence before the Mexican Court of one of the parties, and the appearance by the Respondent, through a Mexican attorney, and rejects the subsequent spouse's (Petitioner's) collateral attack upon that Mexican decree made for the purpose of invalidating his six-year existing marriage to Respondent herein—violate Petitioner's constitutional rights by depriving him of property or rights without due process of law?

2. Should Petitioner's application for Certiorari be entertained to review an alleged Federal constitutional issue which Petitioner never asserted in the State Court, except for the first time in an application in the Court of Appeals for reargument, or in the alternative to amend the remittitur so as to indicate that Petitioner had raised a constitutional question—which application was denied?

3. Is the Petition for Certiorari timely when the final order of the Court of Appeals of the State of New York, was entered on July 9, 1965, and the Petition filed herein on April 21, 1966?

## Statute Involved

The Statute involved herein, is 28 U. S. C. § 2101(c) reading as follows:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

## ARGUMENT

**Petitioner's contention that when the New York Court of Appeals affirmed recognition and validity of the Mexican Bilateral Divorce Decree which dissolved Respondent's prior marriage—it deprived Petitioner without due process of law in violation of the Federal Constitution, of his alleged right to terminate his six-year marriage to Respondent—is frivolous as a matter of law, and indefensible morally.**

The Petitioner-husband asserts that though when he married Respondent in New York on November 30, 1956, and was aware of Respondent's Mexican bilateral decree

of divorce entered on October 2, 1954 upon the physical presence before the Mexican Court of Respondent's former spouse (Felix Kaufmann), and Respondent's appearance in that action by her Mexican attorney—that the Court of Appeals of the State of New York, deprived Petitioner, without due process of law in violation of his Federal Constitutional rights, of his alleged right to assert—almost six years after marriage to Respondent (on April 26, 1962) —his disavowal of his marriage and to consider void her Mexican divorce from her former spouse—when the Court of Appeals rejected Petitioner's collateral attack upon Respondent's Mexican bilateral divorce decree, and determined that it validly dissolved Respondent's prior marriage to Kaufmann.

Petitioner questions whether *"due process"* permits the Court of Appeals to determine—as a matter of comity, and consonant with its own concept of a "balanced public policy", in keeping with a long line of similar decisions by theNew York Supreme Court as well as by the Appellate Divisions of the Supreme Court for several Judicial Departments of New York, to accord recognition and validity to the aforementioned Mexican bilateral divorce decree—in view of the fact that other States had refused to recognize such a decree? (See Questions "2" and "3" at p. 3 of Petitioner's Brief.)

The following from the *"Opinion"* of the Court of Appeals (16 N. Y. 2d 64), succinctly reveals the legal and equitabe reasons underying that Court's determination to continue New York's long-standing recognition of the validity of the Mexican bilateral decree of divorce such as the decree involved herein, and conclusively refutes the charge of arbitrary disregard of fundamental time-honored legal principles determinative of *"jurisdiction"*:

> "In the background of this problem is a long series of decisions over a period of a quarter of a century in the New York Supreme Court at Appellate Divi-

sion and at Special Term recognizing the validity of bilateral Mexican divorces which we consider has some relevancy to the question before us.[1] No New York decision has refused to recognize such a bilateral Mexican divorce.

It has been estimated that many thousands of persons have been affected in their family and property status by these decisions (cf. Flint, Divorce by Personal Jurisdiction of the Parties—A Support for the Mexican Bi-lateral Divorce, 29 Albany L. Rev. 328, and Report of the Joint Legislative Committee on Matrimonial and Family Laws, N. Y. Legis. Doc., 1957, No. 32; *id.*, N. Y. Legis. Doc., 1961, No. 19)" (*id.* p. 71)

• • •

"There is squarely presented to this court now for the first time the question whether recognition is to be given by New York to a matrimonial judgment of a foreign country based on grounds not accepted in New York, where personal jurisdiction of one party to the marriage has been acquired by physical presence before the foreign court; and jurisdiction of the other has been acquired by appearance and pleading through an authorized attorney although no domicile of either party is shown within that jurisdiction; and 'residence' has been acquired by one party through a statutory formality based on brief contact." (p. 71)

• • •

"The former husband was physically in the jurisdiction, personally before the court, with the usual incidents and the implicit consequences of voluntary submission to foreign sovereignty. Although he had no intention of making his domicile there, he did what the domestic law of the place required he do to establish a 'residence' of a kind which was set up as a statutory prerequisite to institute an action for divorce." (p. 72)

• • •

"The voluntary appearance of the other spouse in the foreign court by attorney would tend to give further support to an acquired jurisdiction there

over the marriage as a legal entity. In theory jurisdiction is an imposition of sovereign power over the person." (p. 72)

• • •

"The duration of domicile in sister States providing by statute for a minimal time to acquire domicile as necessary to matrimonial action jurisdiction is in actual practice complied with by a mere formal gesture having no more relation to the actual situs of the marriage or to true domicile than the formality of signing the Juarez city register. The difference in time is not truly significant of a difference in intent or purpose or in effect.

"The State or country of true domicile has the closest real public interest in a marriage but, where a New York spouse goes elsewhere to establish a synthetic domicile to meet technical acceptance of a matrimonial suit, our public interest is not affected differently by a formality of one day than by a formality of six weeks.

"Nevada gets no closer to the real public concern with the marriage than Chihuahua. New York itself will take jurisdiction of a matrimonial action without regard to domicile or residence if it happened, by mere fortunity, that the marriage was contracted here, even between people entirely foreign to our jurisdiction (Domestice Relations Law, Consol. Laws, c. 14 § 170, subd. 2; see, e. g., David-Zieseniss v. Zeiseniss, 205 Misc. 836, 129 N. Y. S. 2d 649; Becker v. Becker, 58 App. Div. 374, 69 N. Y. S. 75).

"A leading New York decision on the recognition of a divorce granted in a foreign nation where we are under no constitutional compulsion to give full faith and credit is Gould v. Gould, 235 N. Y. 14, 138 N. E. 490 [1923] and there the court sustained a judgment of divorce in France between parties not domiciled in France at a time when the husband who instituted the French action, was domiciled in New York." pp. 73-4)

• • •

"A balanced public policy now requires that recognition of the bilateral Mexican divorce be given

rather than withheld and such recognition as a matter of comity offends no public policy of this State." (p. 74)

**Petitioner's Federal Citations allegedly demonstrating that the Court of Appeals' determination herein violated principles of due process—are wholly inapposite.**

Petitioner's argument under the heading "DUE PROCESS", beginning at page "15" through "22" of his Brief, to the effect that foreign judgments rendered without jurisdiction of the parties or of the subject matter, cannot be enforced, is wholly inapplicable—since it assumes an unfounded premise that the Mexican Court had no jurisdiction of the Respondent herein and of her former spouse—an assumption which is competely refuted by the undisputed facts accepted by all parties and all courts.

Accordingly, cases such as *Griffin* v. *Griffin* (327 U. S. 220); *Alton* v. *Alton* (207 F. 2d 667); *Pennoyer* v. *Neff* (95 U. S. 714) and other cases to the same effect, are completely irrelevant, for in each of these cases either the party against whom the judgment was entered—service of process had not been effected, or the Court which purported to act, had no jurisdiction of the subject matter.

Thus, in the *Griffin* case (*supra*), a judgment in excess of $25,000, was entered in the New York Courts against the Petitioner *ex parte,* though, under the then applicable statute, Petitioner had the right to apply to the New York Supreme Court for a reduction *nunc pro tunc* of accrued alimony, because of a change in financial circumstances affecting his ability to pay. Under orthodox principles governing *in personam* judgments or orders, this Honorable Court vacated the *ex parte* judgment entered against the Petitioner.

In *Alton* v. *Alton* (207 F. 2d 667)—as in the case of *Granville-Smith* v. *Granville-Smith* (349 U. S. 1), the dis-

positive fact was the conflict between the Virgin Island Statute and the Organic Act, which expressly limited the powers of that territorial legislature. The dictum concerning the constitutional question involved was disposed of by Judges Clark, Black and Reed, in their dissent in the *Granville-Smith* case. Mr. Justice Frankfurter asserted as the sole ground for the decision, that the Virgin Island Legislature had exceeded the statutory authority granted to it by Congress in the Virgin Island Organic Act.

In view of the fact that all of the other cases cited by Petitioner deal with absence of jurisdiction of the person or of the subject matter, it would unduly burden this Honorable Court by further discussion concerning them.

Moreover, the basic immorality of Petitioner's claim to a vested constitutional right to enjoy a marriage-at-will relationship with Respondent, terminable solely at Petitioner's choice regardless of the number of years of his marriage—is too obvious and shocking to require elaboration. Holding that such a concept should not be countenanced by a Court of Equity, Mr. Justice Valente, in a concurring *Opinion* in the Appellate Division (21 App. Div. 2d 635), said:

> "That discretion to deny equitable relief should properly be exercised in cases such as the instant one both from the standpoint of our public policy to preserve existing marriages and from the decidedly inequitable conduct of the plaintiff who entered into the marriage fully aware of the circumstances and the legal doubts surrounding the obtaining of the Mexican divorce decree. The evidence established that plaintiff knew of defendant's prior Mexican divorce before the parties were married in November, 1956. In fact, before the parties went to the License Bureau, plaintiff arranged to have defendant bring the Mexican divorce decree to his attorney for examination and opinion. Moreover, the parties had the Corporation Counsel's office approve their respective divorce decrees before a mar-

> riage license was issued. After having been married for five and one-half years, plaintiff commenced this action in April, 1962 for an annulment. To grant an annulment herein would, in effect, import into the law a species of marriage terminable at the will of one spouse by the simple expedient of changing his attorney'' (26a-27a).

Petitioner's misconception that the fact that other States do not accord recognition to such a Mexican decree creates a Federal Constitutional issue, is completely refuted by the following from this Honorable Court's *Opinion* in *Beck* v. *Washington* (369 U. S. 541):

> "We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . or immunity from judicial error . . .'. Milwaukee Electric R. & Light Co. v. Wisconsin, 252 U. S. 100. Were it otherwise every alleged misapplication of state law would constitute a Federal Constitutional question'' (*id* 554).

**Petitioner may not raise constitutional issues which were not raised at the trial.**

In any event, Petitioner did not contend either at the trial or in the Appellate Courts of New York, that his Federal Constitutional rights had been violated. It was not until February 10, 1966, seven months after the New York Court of Appeals' Decision which was entered on July 9, 1965, that Petitioner moved in the Court of Appeals to amend "the remittitur of this (that) Court to indicate and show tht upon plaintiff-appellant's appeal to this Court (referring to the Court of Appeals), there were raised, and necessarily based upon, constitutional questions under the 14th Amendment to the Constitution of the United States . . .''—which motion was denied by the Court of Appeals, on February 24, 1966.

It is too well settled under both Federal and New York law to require elaboration, that a Constitutional issue can-

not be raised in this Honorable Court, if it was not raised in the Courts below. *Nathan* v. *Equitable Trust Company* (250 N. Y. 250, 253); *Dodge* v. *Correlius* (168 N. Y. 242); *Beck* v. *Washington* (369 U. S. 541). In the *Beck* case (*supra*), this Honorable Court refused to consider Constitutional issues not raised at the trial, if the State Court follows such a policy. And as above cited, the State of New York follows such a policy. *Nathan* v. *Equitable Trust Co.* (250 N. Y. 250, 253).

**The Petition is untimely and should therefore be dismissed.**

28 U. S. C., Sec. 2101(c) expressly provides that any application for a Writ of Certiorari must be applied for within 90 days after the entry of the Judgment or Decree entered in the State Court.

The Court of Appeals of the State of New York entered its final Order on July 9, 1965. The Petition herein was not filed in this Court until April 21, 1966, more than 9 months after the entry of the final Order and Judgment of the Court of Appeals.

Certainly Petitioner's motion in the Court of Appeals, made on February 10, 1966 (7 months after the Decision by the Court of Appeals) for leave to reargue, or in the alternative, for leave to amend the remittitur—did not extend Petitioner's time within which to apply for a Writ of Certiorari.

Thus, in *Stern & Gressman's "Supreme Court Practice"* (3rd Ed. 1962) it is said that:

> "The order or judgment of the highest State Court is controlling as to the running of the time even though under the State practice the actual judgment is that entered by an inferior court on remand, remittitur or rescript. Dept. of Banking v. Pink, 317 U. S. 264; Cole v. Violette, 319 U. S. 581. In such cases the function of the lower State Court is

the ministerial one of entering the judgment . . ." (p. 304).

Accordingly, the Petition herein is untimely and should be dismissed.

## CONCLUSION

**Respondent respectfully submits that for the same reasons which persuaded this Court to deny Certiorari in the *Wood* case, Petitioner's application for a Writ of Certiorari should be denied.**

Respectfully submitted,

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